

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a Washington corporation,

CASE NO. C10-1823-JLR

Plaintiff,

DEFENDANTS' RESPONSE TO THE
COURT'S APRIL 23, 2012 ORDER TO
SHOW CAUSE

MOTOROLA, INC., MOTOROLA
MOBILITY, INC., and GENERAL
INSTRUMENT CORPORATION,

Defendants.

DEFENDANTS' RESPONSE TO THE COURT'S APRIL 23, 2012 ORDER TO SHOW CAUSE
CASE NO. C10-1823-JLR

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1 I. INTRODUCTION

2 Defendants Motorola, Inc. (now Motorola Solutions, Inc.), Motorola Mobility, Inc. and
 3 General Instrument Corporation (collectively, "Motorola") hereby respectfully respond to the
 4 Court's April 23, 2012 Order to Show Cause (Dkt. 292) as to why certain documents filed with the
 5 Court should remain under seal. These documents, which were in part the subjects of Microsoft's
 6 March 30, 2012 Motion to Seal (Dkt. 234), include Exhibits 15, 17 and 19 to the March 30, 2012
 7 Declaration of Christopher Wion in support of Microsoft's Motion For Summary Judgment of
 8 Breach of Contract (Dkt. 238). (On April 24, 2012, the court granted (Dkt. 294) Motorola's
 9 March 30, 2012 Motion to Seal (Dkt. 227) numerous documents, including two of the three
 10 documents referenced in the Court's April 23, 2012 Order to Show Cause.) Pursuant to Western
 11 District of Washington Civil Local Rule CR 5(g)(2) and Rule 26(c), Fed. R. Civ. P., and for the
 12 reasons described below, Motorola respectfully requests that each of these documents remain
 13 under seal.

14 II. BACKGROUND

15 Microsoft Corporation ("Microsoft") and Motorola entered into a stipulated Protective
 16 Order in this case, which was approved by the Court on July 21, 2011. (Dkt. 72.) This Protective
 17 Order outlines categories of material that should be maintained in confidence, along with
 18 procedures for sealing confidential material when included in documents filed with the Court.
 19 Specifically, ¶ 1 specifies that:

20 Confidential Business Information is information which has not been made public
 21 and which concerns or relates to the trade secrets ... amount or source of any
 22 income, profits, losses, or expenditures of any person, firm, partnership,
 23 corporation, or other organization, the disclosure of which information is likely to
 have the effect of causing substantial harm to the competitive position of the
 person, firm, partnership, corporation, or other organization from which the
 information was obtained....

24 *Id.* at 1-2. This information should be marked as "CONFIDENTIAL BUSINESS
 25 INFORMATION, SUBJECT TO PROTECTIVE ORDER." *Id.* at 2. Additionally, ¶ 6 specifies
 26 similar procedures for highly confidential licensing or financial information. (See Dkt. 72 at 4.)

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1 Finally, ¶ 2 of the Protective Order governs the sealing of documents, and states that Motorola or
 2 Microsoft may request to seal documents by formal motion pursuant to Rule 5(g) of the Local
 3 Civil Rules of the Western District of Washington.

4 Local Rule CR 5(g)(2) provides that in a dispositive motion, the presumption of the
 5 public's right of access to information in court filings may be overcome by a compelling showing
 6 that the interest in protecting sensitive information from review outweighs the public's right of
 7 access. Similarly, federal law recognizes that courts should protect trade secrets or other
 8 confidential commercial information by reasonable means, permitting the filing under seal of
 9 documents containing such information. *See* Fed. R. Civ. P. 26(c)(1)(G) and (H).

10 **III. DUE TO THE POTENTIAL FOR COMPETITIVE HARM, THE INFORMATION
 11 AND DOCUMENTS SHOULD BE KEPT UNDER SEAL**

12 In accordance with Local Rule CR 5(g)(2), Motorola asserts that the public's right of
 13 access is outweighed by the interest in protecting the files and information from review and
 14 keeping the documents under seal for the following stated reasons:

15 A. Exhibit 15 to the March 30, 2012 Declaration of Christopher Wion.

16 Exhibit 15 (Dkt. 238-15) is a copy of the transcript of the January 20, 2012 hearing held in
 17 *In The Matter of Certain Gaming and Entertainment Consoles, Related Software, and*
 18 *Components Thereof*, Inv. No. 337-TA-752 (U.S.I.T.C.) by ALJ Shaw, which reproduces the
 19 confidential sworn testimony given by Kirk W. Dailey in that hearing.

20 This sworn testimony was given during a Confidential session in the ITC hearing and is
 21 covered by the Protective Order in that case. Pursuant to an agreement between the parties, this
 22 testimony was produced and may be relied upon in this case. It has been marked as "Contain[ing]
 23 Motorola Mobility, Inc. and/or Third Party Confidential Business Information, Subject to
 24 Protective Order – Attorneys' Eyes Only." Accordingly, this confidential information is covered
 25 by the protective order in both cases. Throughout his testimony, Mr. Dailey disclosed highly
 26 confidential information about Motorola's licenses, licensing history and internal business
 practices. Disclosure of this information to third parties and other party employees not covered by

1 the protective order would have the potential to lead to competitive harm. Due to presence of this
 2 highly confidential information throughout the transcript, Exhibit 15 should be sealed in its
 3 entirety.

4 In its April 24, 2012 Order (Dkt. 294), the Court granted Motorola's March 30, 2012
 5 Motion to Seal (Dkt. 227) the transcript of this testimony, noting that, like each of the documents
 6 mentioned in Motorola's Motion, this transcript "contains information about Motorola's licenses,
 7 licensing history, internal business practices, and/or legal practices" and is "sufficiently
 8 confidential to meet the 'compelling reasons' standard." (Dkt. 294 at 3.)

9 B. Exhibit 17 to the March 30, 2012 Declaration of Christopher Wion.

10 Exhibit 17 (Dkt. 238-17) is a copy of selected pages from the transcript of the deposition of
 11 K. McNeill Taylor, Jr., which was designated "Highly Confidential" and was taken under oath in
 12 New York, NY, on March 20, 2012.

13 Throughout his testimony, Mr. Taylor disclosed highly confidential information about
 14 Motorola's licenses, licensing history, internal business practices, and confidential
 15 communications between the parties' respective legal departments. Disclosure of this information
 16 to third parties and other party employees not covered by the protective order would have the
 17 potential to lead to competitive harm. Due to the presence of this highly confidential information
 18 throughout the transcript, Exhibit 17 should be sealed in its entirety. In its April 24, 2012 Order
 19 (Dkt. 294), the Court granted Motorola's March 30, 2012 Motion to Seal (Dkt. 227) the full
 20 transcript of this deposition, noting that "each document [mentioned in Motorola's Motion]
 21 contains information about Motorola's licenses, licensing history, internal business practices,
 22 and/or legal practices such that each document is sufficiently confidential to meet the 'compelling
 23 reasons' standard." (Dkt. 294 at 3.)

24 C. Exhibit 19 to the March 30, 2012 Declaration of Christopher Wion.

25 Exhibit 19 (Dkt. 238-19) is a copy of selected pages from the transcript of the Rule
 26 30(b)(6) deposition of K. McNeill Taylor, Jr., which was designated "Highly Confidential" and

1 was taken under oath in New York, NY, on March 20, 2012, immediately following Mr. Taylor's
 2 prior deposition testimony, which was included as Exhibit 17 to the March 30, 2012 Declaration
 3 of Christopher Wion (and which is discussed above).

4 As he had throughout his prior deposition testimony, throughout his 30(b)(6) testimony,
 5 Mr. Taylor disclosed highly confidential information about Motorola's licenses, licensing history,
 6 internal business practices, and confidential communications between the parties' respective legal
 7 departments. Disclosure of this information to third parties and other party employees not covered
 8 by the protective order would have the potential to lead to competitive harm. Due to the presence
 9 of this highly confidential information throughout the transcript, Mr. Taylor's 30(b)(6) testimony
 10 should be sealed in its entirety – and so Exhibit 19, which is a copy of selected pages from the
 11 transcript of that testimony, should similarly be sealed in its entirety.

12 IV. CONCLUSION

13 For the foregoing reasons, Motorola respectfully requests that this Court order that the
 14 following documents remain under seal:

15 1. Exhibit 15 to the March 30, 2012 Declaration of Christopher Wion in support of
 16 Microsoft's Motion For Summary Judgment (Dkt. 238-15);

17 2. Exhibit 17 to the March 30, 2012 Declaration of Christopher Wion in support of
 18 Microsoft's Motion For Summary Judgment (Dkt. 238-17); and

19 3. Exhibit 19 to the March 30, 2012 Declaration of Christopher Wion in support of
 20 Microsoft's Motion For Summary Judgment (Dkt. 238-19).

1 DATED this 30th day of April, 2012.

2 SUMMIT LAW GROUP PLLC

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 30th day of April, 2012.

/s/ Marcia A. Ripley
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DEFENDANTS' RESPONSE TO THE COURT'S APRIL 23, 2012 ORDER TO SHOW CAUSE - 7
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